In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1269

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Petitioner,

against

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Leonard D. Wexler
Attorney for Respondent
28 Manor Road
Smithtown, New York 11787
(516) 265-4500

Richard T. Haefeli
Meyer & Wexler
of Counsel

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Argument

The Second Circuit Court of Appeals decision in *Dwen* v. *Barry*, 483 F.2d 1126 (2nd Cir. 1973), is consistent with the Eighth Circuit Court of Appeals decision in *Stradley* v. *Anderson*, 478 F.2d 188 (8th Cir. 1973), with respect to the

constitutional questions raised. Both Circuits hold:

> that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. *Dwen* v. *Barry*, at 1130; Accord, *Miller* v. *Ackerman*, 48 F.2d 920, 922 (8th Cir., 1973).

The distinction in the two cases is based upon the findings of the lower court in each circuit. See, *Burback* v. *Goldschmidt*, 521 P.2d 5, 8 n.5. In *Stradley*, the lower court found that there was sufficient evidence to uphold the regulation, whereas in *Dwen*, the lower court found that there was insufficient evidence and struck down the regulation. A conflict based upon findings of fact should not be reviewed by this Court. See also, *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, 332, 72 S.Ct. 690, 695, 92 L.Ed. 978; *United States* v. *United States Gypsum, Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542; Rule 52 (a) F.R.C.P.

This distinction also applies to the case of *Kamerling et al.* v. *O'Hagan*, 2nd Cir., decided March 18, 1975 Docket No. 74—2155 and cited by petitioner, in support of his position.

Parenthetically, it should be pointed out that the result reached in *Stradley* has been questioned by its author in the recent case of *Rinehart* v. *Brewer*, 491 F.2d 705, 707 n.1 (8th Cir., 1974):

> On reflection there was no evidence developed in *Stradley* which demonstrated that a police officer could not carry out his duties just as efficiently with his own hair style as compared to the one insisted upon by his superiors.

Although the petitioner claims that *Dwen* is in conflict with *Greenwald* v. *Frank*, 70 Misc.2d 632, 334 N.Y.S. 2d

680, judgment affirmed as modified, 40 A.D. 2d 717, 337 N.Y.S. 2d 225, affirmed 32 N.Y.2d 862, 364 N. S. 2d 529, such a conflict does not exist since the *Greenwald* decision was not based upon constitutional grounds. *McCune* v. *Frank*, E.D.N.Y., Decided December 13, 1974, docket No. 74C 1279. The Appellate Division specifically stated at 337 N.Y.S.2d 226:

> In our opinion this regulation does not raise issues which rise to the dignity of constitutional questions.

As to the issue of whether the lower court should have refrained from deciding *Dwen*, based upon the decision in *Greenwald*, this issue not having been raised below should not be reviewed by this Court. *Walters* v. *City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 S.Ct. 505, 507, 98 L.Ed. 660.

Not only was the original decision by the Second Circuit in *Dwen*, a final determination as to the constitutional issues raised, thereby precluding the petitioner from obtaining review at this time, *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 135-136, 46 S.Ct. 52, 53, 70 L.Ed. 195, but in view of the fact that this court has consistently refused to grant certiorari in similar cases, *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed. 2d 125; *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir., 1969), cert. denied 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed. 2d 268; *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir., 1970), cert. denied, 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed. 2d 88; *Stevenson* v. *Board of Education of Wheeler County, Georgia*, 426 F.2d 1154 (5th Cir., 1970), cert. denied, 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed. 2d 265; *King* v. *Saddleback Junior College District*, 445 F.2d 932 (9th Cir., 1970), cert. denied. 404 U.S. 979, 404 U.S. 1042, 92 S.Ct. 703, 30 L.Ed. 2d 736; *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir., 1971), cert. denied, 405 U.S. 1032, 92 S.Ct. 1292 31 L.Ed. 2d 489; *Landsdale* v.

Tyler Junior College, 470 F.2d 659 (5th Cir., 1972), cert. denied, 411 U.S. 986, 93 S.Ct. 2268, 36 L.Ed. 2d 964, and as the petitioner fails to assert any new compelling ground for review, the present petition should also be denied.

CONCLUSION

For the reasons set forth above, the present petition for a Writ of Certiorari should be denied.

Dated: May 2, 1975.

Respectfully submitted,

LEONARD D. WEXLER
Attorney for Respondent
28 Manor Road
Smithtown, New York 11787
(516) 265-4500

RICHARD T. HAEFELI
MEYER & WEXLER
of Counsel